IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 109

FEDERAL POWER COMMISSION *et al.*

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED *et al.*

No. 188

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED *et al.*

No. 209

MEMPHIS LIGHT, GAS AND WATER DIVISION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED *et al.*

No. 212

ILLINOIS COMMERCE COMMISSION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR MEMPHIS NATURAL GAS COMPANY.

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The Opinion Below.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.

Jurisdiction.

The order of the Court of Appeals was entered on May 12, 1948 (R. 109-112). The petition for a writ of certiorari was filed on June 21, 1948, and granted on October 11, 1948 (R. 118-121). The jurisdiction of this Court rests upon 28 U. S. C. A. §1254.

Introduction.

This case involves the distribution of funds impounded pending legal review of an order of the Federal Power Commission reducing interstate rates charged by the Interstate Natural Gas Company, Incorporated (hereinafter called "Interstate"). The order of the Commission reducing these rates was sustained by this Court in the case of *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, decided June 16, 1947.

Thereafter, controversy arose as to the distribution of the fund representing the difference between the rates formerly charged by the Interstate Company and the rates as finally reduced.

Memphis Natural Gas Company (hereinafter called "Memphis Natural") was an interstate natural gas company which had purchased gas directly from the Interstate Company for resale to local distributing companies and others. Memphis Natural filed an intervening pet'on asking for re-payment of the excess rates paid by it which had been paid into the impounded fund. Other distributing companies which had purchased direct from the Interstate Company filed similar petitions (R. 49, 65, 71).

The Federal Power Commission, however, took the position that the impounded funds should be paid—not to the direct customers of Interstate—but to the ultimate con-

sumers who purchased gas from local distributors in intrastate commerce.

The Memphis Gas, Light and Water Division (hereinafter called "the Division") also intervened. The Division is an agency of the City of Memphis which purchases gas from Memphis Natural and distributes it locally to ultimate consumers in the City of Memphis. The Division asked that a part of the impounded fund be allocated and paid directly to it in proportion to the amount of gas which it had purchased from Memphis Natural.

The Circuit Court of Appeals for the Fifth Circuit, in which the Interstate rate case had been pending, heard all the intervenors, and on March 12, 1948, decided that the impounded funds should be paid to Memphis Natural and to the other direct customers of Interstate which had paid to Interstate the excess rates of which the fund was composed (166 F. 2d 796; R. 103). The court said (R. 105):

> "A careful consideration of the opposing contentions, in the light of the undisputed facts, leaves us in no doubt that, whatever may be the rights of ultimate consumers or others to require the pipe line companies who have overpaid Interstate to account to them in respect of such overpayments, it is not our function to search out or declare them.* The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipe line companies the moneys which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipe line companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold said companies to account in respect thereof."

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* The court here dropped a footnote citing *Central States v. Muscatine*, 324 U. S. 138.

Applications for certiorari to this Court were thereafter made by the Federal Power Commission and some of the other intervenors. These applications were granted October 11, 1948 (R. 118-121).

The Issue.

There is only one real issue in this case—namely, whether the decision of this Court in *Central States Company* v. *City of Muscatine*, 324 U. S. 138, should be overruled. The Commission's brief in effect concedes this, saying (C. Br., p. 9):

> "We are constrained primarily to contend, however, that *Central States* should be overruled * * *."

The Commission as a secondary argument also raises some points under which it contends that the *Central States* case might be distinguished. But, as we shall show, these distinctions are either unsubstantial or non-existent.

Moreover, the Commission itself admits (C. Br., p. 9)* that these distinctions—even if allowed—would not achieve the Commission's real purpose—namely, to pass over all the intervening companies and pay the impounded fund directly to the ultimate consumers—automatically and *in toto*—without hearing and regardless of the rate of return earned by the intermediary companies.

The Commission's brief admits that unless the *Central States* case is overruled, the distinctions suggested would only result in passing the refund to the distributing companies who buy directly from Memphis Natural, and not to the ultimate consumers themselves (C. Br., p. 9).

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* The brief of the Federal Power Commission will be referred to herein as "C. Br."

Description of Memphis Natural.*

Memphis Natural is a natural gas company within the meaning of the Natural Gas Act. It buys gas from various sources including Interstate Natural Gas Company, Inc. (R. 36-37). It has a pipe line 305 miles long (R. 33). It sells to the following customers (R. 33-34, 36):

Louisiana Power and Light Company—a distributor—

Arkansas Power and Light Company—a distributor—

Mississippi Power and Light Company—a distributor—

West Tennessee Gas Company—a distributor—

Memphis Light, Gas and Water Division of the City of Memphis—an agency of the City of Memphis which acts as a distributor of gas to the consumers in that city—

Memphis Generating Company—a private corporation which is an industrial user of gas.

The amount of excess rates paid to Interstate by Memphis Natural or for its account during the impounding period is $592,465.82.

This amount includes certain sums which had been paid to Interstate but not actually deposited in the fund; and certain sums paid by United Gas Pipe Line Company for the

* On April 9, 1948, Memphis Natural Gas Company and Kentucky Natural Gas Company were merged, the continuing corporation (called Texas Gas Transmission Company) succeeding to all the rights and liabilities of the predecessor corporations. For the purposes of this brief, however, and in order to avoid confusion, Memphis Natural Gas Company is treated as though it had continued its separate existence.

account of Memphis Natural but which United was in turn obligated to pay over to Memphis Natural (R. 43; 111).

There is no dispute concerning this amount; and the order of the court below directed this amount to be paid to Memphis Natural (R. 110, 111).

History of Case.

The order reducing the rates charged by Interstate was entered April 27, 1943. An appeal was filed with the Circuit Court of Appeals for the Fifth Circuit, and an order was entered permitting Interstate to continue to charge the pre existing rates on condition that the excess be impounded.

At about the same time, discussions had been going on between the Federal Power Commission and Memphis Natural which resulted in the filing of a new schedule of rates by Memphis Natural on August 9, 1943. These rates were approved by the Federal Power Commission and became effective as of July 26, 1943 (R. 31).

The Commission found that 6½% upon the investment would be a fair and reasonable return which Memphis Natural was entitled to earn, and the new schedules reduced the rates of Memphis Natural to a point which the Commission believed would permit Memphis Natural to earn that 6½%.

Neither the schedule of rates so filed by Memphis Natural nor the order of the Commission approving these rates made any provision for any change in rates in the event that the reduction of the Interstate rates should be upheld by the courts, nor any provision for the payment of the impounded fund or any portion thereof to customers of Memphis Natural.

The impounding period lasted from June 15, 1943, through October 1947. This was a period of rapidly changing conditions due to the tremendous inflation in wages and in the cost of materials caused by the Second World War.

The Interstate rate reduction order was sustained by the Circuit Court of Appeals for the Fifth Circuit August 3, 1946 (156 F. 2d 949).

Application was made by Interstate for certiorari and was denied by the Supreme Court on January 6, 1947 (329 U. S. 802). The application was renewed, however, and on February 10, 1947, certiorari was granted (330 U. S. 852), and on June 16, 1947, this Court affirmed the decision below approving the Interstate rate order (331 U. S. 682; rehearing denied, 332 U. S. 785).

After the reduction of the rates of Interstate had been affirmed by the Circuit Court of Appeals, Memphis did not make any corresponding reduction in its own rates. On the contrary, on October 31, 1946, it filed new rate schedules which in effect amounted to an application for an increase. This application for an increase was later withdrawn by a letter dated January 20, 1947, and approved by the Commission February 4, 1947 (C. Br. 57). The Commission, on the other hand, did not require Memphis to reduce its rates to reflect the reduction in the rates of Interstate.

The mandate of this Court, following its affirmance of the Commission's order in the Interstate rate case, was filed in the Circuit Court of Appeals October 21, 1947 (R. 15), and a motion for the distribution of the impounded funds was filed by Interstate in the Circuit Court of Appeals December 22, 1947 (R. 16).

Memphis Natural moved to intervene January 26, 1948 (R. 42), and various other intervenors filed petitions at or about the same time.

The Circuit Court of Appeals rendered an opinion March 12, 1948, to the effect that the impounded funds should be paid over to the immediate customers of Interstate, including Memphis Natural, and rejected the Commissioner's contention that it should be paid to the ultimate consumers (R. 103; 166 F. 2d 796).

The case now comes before this Court on certiorari which was allowed October 11, 1948 (R. 118-121).

Outline of Argument.

We agree with the Commission's brief, that the principal question presented to the Court is whether to repudiate or reaffirm the *Central States* case.

This respondent contends that the *Central States* case is sound and should be reaffirmed, because to by-pass Memphis Natural and pay the impounded fund to the ultimate consumers would amount to a revision by the Court of the rates of Memphis Natural and the rates of all the distributing companies which buy gas from Memphis Natural, (1) for which revisions no factual basis has been established, (2) which would be retroactive and hence unauthorized by law, and (3) which would in any event be beyond the jurisdiction of the Court.

The Commission's primary contention is that the purpose of the Natural Gas Act (which the Commission contends is to protect the ultimate consumers) would be defeated if the fund is not paid to the consumers. This is unsound because the Natural Gas Act does not operate to give the ultimate consumers the benefit of a reduction in wholesale rates charged by a natural gas company to an intermediate company, by a direct grant to them of the amount of the reduction. The consumers are benefited by such reduction if and to the extent that it makes possible a prospective reduction in the rates of any intermediate

natural gas company and of the distributing company. Such reduction in the rates of such intermediate companies is made possible if and to the extent that the earnings of such intermediate companies, after giving effect to the wholesale rate reduction and all other factors affecting earnings, are in excess of a fair rate of return.

The Commission's contention that the impounded fund should be paid directly to the consumer by order of the Court is also unsound because it involves an alteration of the rates charged by Memphis Natural to its customers without compliance with the procedure laid down by the Natural Gas Act therefor—namely, a hearing before the Commission as to whether Memphis Natural is earning in excess of a fair rate of return, with a right in Memphis Natural to have the findings and conclusions of the Commission reviewed by the courts.

The argument of the Commission is made up of a fallacious assumption of law, that consumers are entitled to receive the reduction in wholesale rates of the natural gas company, as such, without any demonstration (in a properly conducted rate case) that the resulting rates of the intermediate companies are excessive.*

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* At least the Commission makes this assumption in cases where the amount of the reduction has been impounded by the court pending the determination of an appeal from the rate order. The Commission has not suggested that the intermediate companies must, after the rate reduction order has been affirmed and the impounding ended, pay to the ultimate consumer the amount of the reduction in wholesale rates, as such, without reference to the adequacy of their own rates. But any legal doctrine that would permit the Court to order the impounded fund paid directly to the consumers, would also permit the Court to order the entire reduction, past and prospective, to be so paid, which obviously the Court cannot do. Thus, even the Circuit Court of Appeals which decided the earlier phases of Central States and thought it had power to pass the impounded fund directly to consumers—did not think it had any power to order the local distributing company to lower its prospective rates to the consumer *pro tanto*. *Natural Gas Pipe Line v. Federal Power Commission*, 141 F. 2d 27 (C. C. A. 7th 1944).

The argument of the Commission also includes an unwarranted assumption of fact, that the earnings of the intermediate companies, after giving effect to the savings resulting from the rate reduction, would be in excess of a fair rate of return. This fact has not been established, either in the manner required by the Natural Gas Act or otherwise, and we will demonstrate below the unsoundness of this assumption so far as Memphis Natural is concerned.

The Commission seems to be on the horns of a dilemma: on the one hand, the Commission finds it necessary to establish that the intermediate companies would be earning in excess of a fair rate of return if they are permitted to retain the proceeds of the rate reduction. On the other hand, it realizes that this fact has not been established in the manner prescribed by the Natural Gas Act. Consequently it is driven to assume the fact.

The Commission also knows that the Court has no jurisdiction to fix the rates of a natural gas company or of a distributing company and is consequently driven to argue that for the Court to pay the impounded fund to the ultimate consumers is not changing the rates to such consumers.

The Commission now urges upon the Court—as it unsuccessfully urged in the *Central States* case—that the orderly procedure contemplated by the Natural Gas Act be abandoned and that the Court should itself assume a rate-making function and, either by a series of rate reductions of the intermediate companies or by treating the intermediate companies as nonexistent, put the savings occasioned by the wholesale rate reduction directly into the hands of the consumer, without inquiry into or reference to the reasonableness or unreasonableness of the earnings of the intermediate companies.

ARGUMENT

THE *CENTRAL STATES* CASE GOVERNS THIS CASE AND SHOULD NOT BE OVERRULED.

I.

The *Central States* case governs this case.

The case of *Central States Co.* v. *City of Muscatine*, 324 U. S. 138, was decided by this Court in 1945.

In the *Central States* case, as in this case, an order of the Federal Power Commission reducing rates was suspended pending appeal, the difference between the existing rate and the suspended rate being impounded by the court.

In both cases, at the end of the litigation, the Federal Power Commission attempted to impose a new theory of law—namely, that whenever a wholesale rate of a natural gas company has been reduced—the whole series of intermediate companies which derive their gas directly or indirectly from the original company—must be treated as though they did not exist and the impounded saving paid automatically and *in toto*—to the ultimate consumers. And all this without any investigation of the rights of the intermediate companies who actually paid in the money—regardless of

—the earnings of the intervening distributors,

—the changes in their earning power brought about by lapse of time,

—the question whether their rates are subject to any regulation by the Federal Power Commission or a state administrative authority.

The passing on is "presumed" to be "equitable".

No hearing—no order—and none of the usual indicia of due process are necessary or permitted.

The decision of the Supreme Court in the *Central States* case rejected that doctrine.

It held that

(1) Such passing on necessarily involved the legislative function of rate making—which was beyond the power of the court.

(2) Neither has the court any power to fix rates under general equitable principles

> "This, because the court below had no power as a court of equity to fix rates, * * *" (324 U. S. at 144).

(3) This is especially true where the rates so fixed are intrastate rates, subject to state law—but the decision is not restricted to such cases. It denies broadly that such action is a proper function of a Court of Equity.

II.

The decision in the *Central States* case is sound and should be followed.

1. Consumers of natural gas receive the benefit of reductions in wholesale rates effected under the Natural Gas Act, not by direct payment to them of the amount of the reductions, but by the reductions in intermediate wholesale and retail rates made possible thereby.

(a) The Natural Gas Act empowers the Federal Power Commission to regulate interstate rates only, not local rates.

The Act applies

> "to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natu-

> ral gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, * * *" (15 U. S. C. A. §717(b)).

The Act empowers the Commission, upon complaint or on its own motion, by hearing to inquire into the reasonableness of rates and, when it has found existing rates to be unreasonable,—to fix rates thereafter to be charged (15 U. S. C. A. §717(d)).

It requires natural gas companies to file their rate schedules and to abide by the schedules as filed. A natural gas company desiring to increase its rates must file the increased rate schedules, and the Commission is empowered to suspend such rates pending its inquiry into their reasonableness (15 U. S. C. A. §717(c); F. P. C. Reg. §154.21, 13 Fed. Reg. 5215 Sept. 8, 1948.)

The rate-regulating power of the Commission is expressly confined to rates for transportation and sales of natural gas which are subject to the jurisdiction of the Commission, *i.e.*, rates for the transportation of natural gas in interstate commerce and the sale of natural gas in interstate commerce for resale for public consumption. For convenience the rates to which the jurisdiction of the Commission applies are referred to in this brief as "wholesale rates."

The rate-regulating jurisdiction of the Commission, so far as sales of natural gas are concerned, is confined to regulating the wholesale rates of natural gas companies—that is, the amounts charged by natural gas companies to their immediate customers for gas sold to them.

The Commission under its rate regulatory jurisdiction has no power to do anything except to require a natural

gas company, in a proper case, to reduce its rates to its immediate customers. It obviously cannot order the natural gas company, whose rates have been found to be excessive, to continue to charge its customer such excessive rates and to pay the amount of the excess to the ultimate consumer.

If the customer is also a natural gas company, subject to the Natural Gas Act, the Commission can also (simultaneously or at any other time) inquire into the rates of the customer to see if its earnings (as affected by the reduction and all other factors) are excessive and, if so, to reduce its rates. If the customer, however, is a distributing company not subject to the Natural Gas Act, the Commission must leave this second step to the state regulatory authorities.

(b) The courts have jurisdiction only to review the orders of the Commission.

The jurisdiction of the courts is even more limited. The federal court cannot fix or regulate any rates, even those of a natural gas company which is subject to federal regulation. It can only review the orders of the Commission.

Accordingly there is no power in the court to force a natural gas company to reduce its rates and *a fortiori* it has no power to take the benefit of a rate reduction by a natural gas company ordered by the Commission away from the customer whose rates were reduced and give it to someone else, including the ultimate consumer.

If a rate reduction by the Commission is appealed to the court, and a stay of the Commission's order is requested, the court can either (1) stay the order and permit the natural gas company to continue to charge the old rate during the period of the appeal, thus creating an obligation

on the part of the natural gas company to refund the excess to its customers if the Commission's reduction is upheld, or (2) refuse to stay the order, thus creating an obligation in the customer to pay the additional amount if the Commission's reduction is not upheld, or (3) impound the amount in dispute to abide the outcome of the appeal. In such case the impounded fund can only belong to the natural gas company or its customer. Just as the court has no power to give anyone other than the customer the benefit of the rate reduction as a whole, so the court cannot give anyone other than the customer the benefit of that portion of the rate reduction which has been impounded. The court cannot lift itself by its own bootstraps by impounding the fund.

These principles are just as applicable to the present case as they were to the *Central States* case.

2. The Commission's theory—that reductions in the cost of gas must automatically—without more—be reflected in a corresponding reduction in the rates of intermediate distributing companies—necessarily involves an exercise of the rate making function.

The distribution of natural gas involves a very complex mechanism.

The usual pattern is for producing companies, which own gas wells, to sell the gas to pipe line companies (usually interstate and consequently subject to the Natural Gas Act). These in turn sell to other pipe line companies, to local distributing companies and sometimes to industrial users. The local distributing companies sell to the ultimate consumers and to this extent are subject, not to the Natural Gas Act, but to state regulation.

The costs of operation involve many other factors besides the cost of gas. This Court can take judicial notice that during the period under review in this case all costs, labor, materials, operations, maintenance, depreciation, have been rapidly rising because of war and inflation.

Each of the companies involved in the successive steps of distribution is subject to federal or state rate regulation, publishes schedules of rates and files them with the regulatory commissions, and is compelled to adhere to those rates.

Due and orderly processes are provided by law for changes in rates. Rate increases at the instance of the company generally require the filing of new schedules of rates with the regulatory commission, with the power in such commission to suspend the rates pending inquiry into their reasonableness. Reductions in rates can be effected by the regulatory commission, upon complaint or upon its own initiative. These require hearings before the commission, findings by the commission upon the reasonableness of the rates and an order of the commission, with a right in the company to appeal from the order to the courts.

In the present case—the Commission's theory that the impounded fund should be paid to the consumers would in the first instance compel a reduction in the scheduled rates of Memphis Natural to its customers.

In the second stage of distribution it would require a reduction of the rates charged by the customers of Memphis Natural to their local distributors.

In the third place it would require a reduction in the local intrastate rates charged by the local distributors to the ultimate consumers.

These rate schedules have been outstanding and effective during the impounding period and any such reduction

as the Commission asks would constitute a violation of those schedules. It would be, in effect, either a rate reduction or a reparation order.

It is idle to pretend—as does the Commission—that for the Court to order the impounded fund to be paid to the ultimate consumers does not involve rate making. Rates are the prices charged and paid for gas. The Interstate rate, which was reduced, is the price paid by Memphis Natural and others to Interstate for gas. The Memphis Natural rate is the price paid by the customers of Memphis Natural to it for gas. The retail rates are the prices paid by the consumers to the local distributors for gas.

If the Court orders the impounded fund to be paid to the ultimate consumers, such payment can be nothing else but a reduction in the price theretofore paid by the consumers for gas purchased by them. The consumers can be entitled to the payment only on the theory that the rates charged them for the gas during the impounding period were too high by reason of the Interstate reduction and that therefore they are entitled to have such rates reduced. By the same token, if the Court orders a portion of the impounded fund paid to the City of Memphis, such payment can only be a reduction in the price of gas theretofore paid by the city to Memphis Natural. Clearly, such an order would be a change in the rates paid by the ultimate consumer or by the City of Memphis.

The fact that such reduction in the price of gas is not reflected in the rate schedules filed with the regulatory commissions does not alter the fact that the rates paid by the customers have been changed. Indeed this fact merely further indicates the illegality inherent in the change in rates contended for by the Commission, since it involves a departure from the filed rate schedules.

The fact that Memphis Natural is entitled to a reduction in the rates which it pays to Interstate has been decided in the manner expressly provided by the Natural Gas Act, but whether customers of Memphis Natural are entitled to a reduction of the rates they pay to Memphis Natural (whether during or after the impounding period) has not been so decided.

The latter is a wholly different question, depending upon wholly different facts. And the question whether consumers who bought from local distributors are entitled to lower rates depends upon another wholly different set of facts. The parties affected are entitled to have these questions decided after hearing and by due process. Their rights—involving such large sums of money—are not to be determined summarily on the basis of mere assumptions.

Even the Commission does not contend that the order of this Court affirming the reduction of the rates of Interstate has the effect of reducing the rates of all the subsequent distributors prospectively.*

What the Commission is contending—in effect—is that it reduces all of these rates retroactively.

It is contending either for a series of retroactive rate reductions—or for a series of reparation orders—without hearings in either case.

What the Commission asks is a swift and summary rate reduction which will relieve it of the necessity and inconvenience of proving that such a rate reduction is proper.

Such an action is rate making and nothing else.

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* See *Natural Gas Pipe Line Co.* v. *Federal Power Commission*, 141 F. 2d 27, 29 (C. C. A. 7th. 1944).

3. Even the Commission would have no power to (1) prescribe retroactive rates; (2) award reparations; (3) regulate the intrastate rates of the retail distributors; (4) regulate rates for industrial users.

The Commission itself concedes that it has no power to prescribe retroactive rates or award reparations (C. Br., p. 60). This is expressly forbidden by the Act and this Court has so stated in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618, saying:

> "It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'"

It is also clear that it has no power to regulate rates in intrastate commerce. This was also decided in the *Hope Natural Gas* case, *supra*, where this Court said, 320 U. S. 609-11:

> "* * * the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' * * * In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.'"

The Commission also concedes that it has no power to regulate rates for industrial users (C. Br. 51). This Court has so held in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 517.

4. The courts have no power to exercise the legislative function of rate making.

The power of the courts is even more limited than that of the Commission. The courts have no rate making power of any kind—under any circumstances or for any purpose.

The jurisdiction of the court under the Natural Gas Act is stated as follows:

> "Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part" (15 U. S. C. A. §717r(b)).

This Court has repeatedly held that rate making is outside the jurisdiction of the courts.

Newton v. *Consolidated Gas Co.*, 258 U. S. 165, 177:

> "Rate making is no function of the courts and should not be attempted either directly or indirectly."

Pennsylvania R. R. Co. v. *International Coal Mining Co.*, 230 U. S. 184, 196. Speaking of rates, this Court said:

> "So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts."

Mississippi Power & Light Co. v. *Memphis Natural Gas Co.*, 162 F. 2d 388, 390-391 (C. C. A. 5th 1947):

> "Rate making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function."

To the same effect see *Central States Co.* v. *City of Muscatine*, 324 U. S. 138, at 144.

5. The courts cannot make rates indirectly, under the guise of exercising equity powers or imposing conditions for relief.

This is no new question. It arose as early as 1922 in *Newton v. Consolidated Gas Co.*, 258 U. S. 165. In that case the court as a condition of a stay-order directed that the excess be impounded until it could be distributed in accordance with the rates thereafter to be newly established by the Public Service Commission. The Supreme Court said:

> *"It was error to direct ultimate distribution of the impounded funds in accordance with any subsequently approved rate. Rate making is no function of the courts and should not be attempted either directly or indirectly."* (p. 177).*

In *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264 (1933), this Court reversed a decree below which had refused to stay a Commission order reducing gas rates unless the company would agree to file a rate intermediate between the rate fixed by the Commission and the rate previously existing. This Court held that while in some cases equitable relief might be denied to the applicant except upon conditions nevertheless this doctrine did not go so far as to permit a court in effect to exercise the rate making function, saying:

> *"There are nevertheless some limitations upon the extent to which a federal court of equity may properly go* in prescribing such conditional relief, which are inherent in the nature of the jurisdiction which it exercises. District courts may set aside a confiscatory rate prescribed by state authority be-

*Italics in quotations throughout are ours unless otherwise specified.

> cause forbidden by the Fourteenth Amendment, but *they are without authority to prescribe rates* * * * because it is not one within the judicial power conferred upon them by the Constitution. * * * The practical effect of a denial of relief unless the plaintiff will submit to a rate, the reasonableness of which he challenges, is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts. The practice would tend to curtail the exercise of that function by action of a court which is itself without authority either to exercise it or to prevent the state from doing so. Such interference with the legislative function is not a proper exercise of the discretionary powers of a federal court of equity." (pp. 271-72).

Thus in the *Central States* case this Court is merely following well settled principles when it states, 324 U. S. at pp. 143-44:

> "It [the petition of the Central States Company] further attacked the jurisdiction of the court to award the sum to Central's ultimate consumers since such an award amounted to a retroactive reduction of local rates to which the Natural Gas Act, by express terms, did not apply, and, finally, asserted that the court ought not to make the award based on a conclusion of fact unsupported by any evidence that the burden of the excessive rates had been passed on to the consumers whereas the court, at the same time, disclaimed jurisdiction to determine the reasonableness of local rates and, therefore, refused to hear evidence of Central's equitable right to the fund. * * *
>
> "The court below was right in its view that as a federal court it had no power, at least in the absence of federal legislation purporting to confer such power

upon it, to fix or adjust Central's rates, that being a legislative function of the State of Iowa. This would be so where the fund in dispute came into its possession in a proceeding to enjoin the operation of an order affecting state rates, and must be equally true where the proceeding was one to enjoin collection of a rate for interstate service. This, because *the court below had no power as a court of equity to fix rates*, and as a federal court had no power to adjudicate a matter within the legislative competence of Iowa. The court below so held in this case, and has dealt with the matter more fully and to the same effect in another.*"

This Court in the *Central States* case also relied upon another well settled doctrine of privity, namely, that refund should be made to those who had actually paid in the money and not to those who had only a remote and speculative relationship to the transaction. It pointed out, 324 U. S. at 145:

> "Moreover, if Central had paid Pipeline the excessive rates, the latter could not have defended a suit by Central to recover the excess on the ground that Central had passed on the burden to its customers."

In so holding, it merely cited and followed an earlier decision of Mr. Justice Holmes in *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 533-34, in which this Court held:

> "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. . . . *If it be said that the whole transaction is one from a business point of view, it is enough to reply that*

* *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 141 F. 2d 27 (C. C. A. 7th 1944) [footnote by the Court].

> *the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price:* He has no privity with the carrier. * * * The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co.* v. *Ballou & Wright,* 242 Fed. Rep. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of *the endlessness and futility of the effort to follow every transaction to its ultimate result.*"

In *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railroad Company,* 284 U. S. 370, this Court again stated this rule of privity, saying at page 383:

> "The exaction of unreasonable rates by a public carrier was forbidden by the Common law. * * * The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge, to recover damages thus sustained."

Similarly, in *Adams* v. *Mills,* 286 U. S. 397, Mr. Justice Brandeis, speaking for the Court, held that where unloading charges had been held unlawful by the Interstate Commerce Commission the railroad must repay the charges to the commission merchants who actually made the payments, saying:

> "If the defendants exacted from them an unlawful charge, the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer. Acceptance of the shipments would have rendered them personally liable

> to the carriers if the merchandise had been delivered without payment of the full amount lawfully due. * * * As they would have been liable for an undercharge, they may recover for an overcharge. In contemplation of law the claim for damages arose at the time the extra charge was paid. See *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 534. * * *"

This Court recognized the long standing approval which has been accorded this doctrine in a case in which it ordered the return to shippers of freight rate excesses which had been paid by the shippers pending the determination of the validity of a rate reduction order; in *Arkadelphia Co.* v. *St. Louis S. W. Railway Co.*, 249 U. S. 134, this Court said at page 145:

> "But, in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error 'be restored to all things which he hath lost by occasion of the said judgment'; and thereupon, in a plain case, a writ of restitution issued at once; but if a question of fact was in doubt, a writ of *scire facias* was first issued."

6. The cases cited by the Commission do not support its theory or justify reversing the *Central States* case.

It is noteworthy—and we emphasize this point—that the Commission has not cited a single case where the courts compelled the refunding of money to anyone who had not personally and directly paid it.

This is important—indeed it is crucial—to the Commission's argument.

The Commission is here asking the Court to abandon the well settled doctrine of privity—and to distribute the fund to persons who have no direct property interest in it and no enforceable claim against it. In every case cited by the Commission where money was refunded, it was repaid to those who had paid it in the first place.

Typical of these cases are: *United States* v. *Morgan*, 307 U. S. 183, and *Inland Steel Co.* v. *United States*, 306 U. S. 153.

In fact, as this Court pointed out in the *Central States* case, 324 U. S. 138, 145, it regarded those cases as authorities for paying over the impounded fund in that case to the Central States Company. For the same reason they are authorities for paying over the fund in this case to Memphis Natural.

The class action cases—where distribution is made to all the members of the class who contributed to a fund, and not merely to those who actually intervened and demanded payment—are also irrevelant. It would be unreasonable to require every member of the class personally to bring suit.

The case of *Ex parte Lincoln Gas & Electric Company*, 256 U. S. 512, is merely a case of that character.

The money impounded was paid back to the individuals —consumers in that instance—who had directly paid it to the gas company and were in privity with it. The gas company had sued the city government to set aside an ordinance reducing rates and the Court merely allowed the consumers whose money had been impounded during the litigation to have the benefit of the judgment sustaining the ordinance, without the bringing of innumerable personal suits for restitution. But all the consumers as a class were clearly in privity with the fund.

Cases upholding statutes which deny or regulate the refunding of taxes (which have been unconstitutionally collected) where the taxes have been shifted to subsequent purchasers, also have no bearing on this case. The procedure there is prescribed by statute. It involves no extraordinary extension by the court of its own powers. The following cases cited by the Commission are of this statutory tax character: *United States* v. *Jefferson Electric Co.*, 291 U. S. 386; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

The cases stating that where the court has taken possession of property in the course of litigation it has power to determine the rights of those who assert liens or other direct property interests in it or claims against it are also irrelevant. The cases of *Hoffman* v. *McClelland*, 264 U. S. 552; *Oklahoma* v. *Texas*, 258 U. S. 574, and other cases cited in the Commission's brief at p. 19 are cases containing statements of this character.

The ultimate consumers in the present case have no interest in or claim against the fund as such.

The ultimate consumers are in no better position than the ultimate consumers referred to by Mr. Justice Holmes in the *Darnell-Taenzer* case, *supra*. The ultimate consum-

ers would not have been entitled to bring suit against the Interstate Company or Memphis Natural directly. For the same reason they have no right to proceed against the fund.

The mere fact that the Interstate rate reduction may result in a reduction in the costs of Memphis Natural Gas Company or secondarily in the costs of distributors who purchase from it, and thus might eventually permit a reduction in the rates paid by consumers, does not give the consumers an interest in or a claim against the fund as such which a court of equity can measure and determine. It merely gives them the right to anticipate that the rate-making machinery set up by the Natural Gas Act will function to bring about a rate reduction to them if one proves to be justified.

The courts have wisely refused to follow the consequences of rate-making beyond their first impact and to attempt to give rights of action to persons who may be affected only in a speculative and consequential manner. Whatever interests they have are not proximate. They are too remote. As Mr. Justice Holmes wisely said in the *Darnell-Taenzer* case, *supra*,

> "Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result."

There is another well defined class of cases in which this Court has refused to give affirmative relief where the result would be to aid and abet achieving some illegal end—such as the collection of a rebate. Cases of this class cited by the Commission are:

Atlantic Coast Line v. *Florida*, 295 U. S. 301;
General American Tank Car Corp. v. *Eldorado Terminal Co.*, 308 U. S. 422 (in which the opinion was written by Mr. Justice Roberts, who later wrote the majority opinion in the *Central States* case);
Inland Steel Co. v. *United States*, 306 U. S. 153.

In the *Inland Steel* case, for example, Mr. Justice Black, speaking for the Court, said (306 U. S., at 158):

> "When the court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law; and it became the duty of the court promptly to allocate the fund to its lawful owner."

In the *Atlantic Coast Line* case the Interstate Commerce Commission had found that certain rates were discriminatory, but its order was technically defective. The Court, after the Commission had cured the defect, refused to permit a shipper to sue for restitution of sums paid by him in obedience to the technically defective order—where the result would have been to enable him to enjoy the fruits of that discrimination. The Court said that the Commission had in fact found inequality and injustice and that

> "* * * restitution is without support in equity and conscience * * *.
>
> * * * * * * *
>
> "In the exercise of that power it [the court] is not required to lend its aid in perpetuating a forbidden practice. * * * All that the Federal court does is to announce that it will stand aloof. * * * This is not usurpation. It is not action of any kind. It is mere

inaction and passivity . . . ." (Cardozo, J., pp. 312, 314-15).

The *Inland Steel* case, *supra*, was another case involving allowances in the nature of rebates which had been granted to the petitioning Steel Company. The Interstate Commerce Commission found these allowances illegal, and ordered their discontinuance, but the district court temporarily postponed the effective date of the order. The Steel Company sued to recover the amount of the allowances, which had been kept by the Railroad in a separate account. The Court rejected the claim. It held that the original determination of the Commission that the allowances were illegal still stood and was a sufficient basis to justify the Court in refusing to compel an illegal payment.

The crux of the case is the statement (306 U. S. at 158) that

> "When the court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, ..."

Similarly in *United States* v. *Morgan*, 307 U. S. 183; 313 U. S. 409. Stockyard rates had been held excessive by the Secretary of Agriculture, and the excess impounded during the appeal. The order had a procedural defect, which was shortly cured, and the excess payments repaid to those who had paid them into the fund.

It is clear that in none of these cases did the Court itself exercise any administrative function. ***In every case there was an administrative finding*** upon which the action of the Court was based.

Moreover, in *every* case dealing with impounded funds the funds were paid over to those by whom they were paid in.

Every one of those cases is consistent with the opinion of Mr. Justice Holmes, speaking for this Court in *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, in which he said (p. 534):

> "If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. * * * Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result."

7. The Court cannot determine what would be "equitable" upon the basis of mere presumptions.

The Commission, in effect, is asking the Court to pass this large sum of approximately $600,000 over, to the ultimate consumer *in toto* on the mere assumption—without proof or even hearing—that Memphis Natural and each of the intermediate purchasers from Memphis Natural has been receiving in excess of a fair rate of return during the impounding period.

The court should indulge in no assumptions on matters as substantial as this.

Indeed the presumption—if any is to be indulged in—would be just the other way.

The Commission approved rates to be charged by Memphis Natural in April 1943—at approximately the same

time that it reduced the rates on the gas it purchased from Interstate.

The rates of Memphis Natural were established on a basis which it was estimated would *then* give Memphis Natural a net return of 6½% under the conditions *then* prevailing.

This was early in the war.

There is no presumption whatever that those rates continued to net Memphis Natural a fair return thereafter under the rapidly developing inflation due to war conditions.

The impounding period continued for nearly four years.

Those four years constituted one of the greatest periods of inflation that the country has ever seen.

Labor had successive rounds of wage increases. The cost of materials mounted sky high.

Meanwhile, throughout those four years of rising costs Memphis Natural received no increase in the rates it received from others.

What reason is there to suppose that a rate which would have been reasonably remunerative in 1943 continued so.

Indeed this Court, in rate cases and in other cases, has taken judicial notice of the effects of war—and inflation that accompanies and follows war.

For example, in *Lincoln Gas & Electric Light Company v. City of Lincoln, et al.*, 250 U. S. 256, 268, this Court said:

> "It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and *largely since this cause was last heard in the court below.*"

In *Central Kentucky Natural Gas Co. v. Railroad Comm'n*, 290 U. S. 264, 275, this Court said:

> "That restriction [to findings as of December, 1926] also necessarily excluded from consideration the profound changes in values, cost of service, consumption of commodities and reasonable return on invested capital which we judicially know took place during the period of more than five years while the case was pending before the Commission and the court. See Atchison, Topeka & Santa Fe Ry. *v.* United States, 284 U. S. 248, 52 S. Ct. 146, 76 L. Ed. 273."

In *Atchison etc. Ry. Co.* v. *United States*, 284 U. S. 248, 260, this Court said:

> "It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements."

And in *Old Colony Bondholders* v. *New York, N. H. & H. R.R.*, 161 F. 2d 413, 423 (C. C. A. 2d 1947), *cert. denied*, 331 U. S. 858, the Court took judicial notice of the rising costs of labor and material during the very period of impoundment in the present case—1943-47—saying:

> "Indeed, if the closing date [of the bankruptcy plan] were to be advanced [from 1943] to 1946 or 1947 the change would probably be detrimental rather than beneficial to the appellant, for the court may take judicial notice that war earnings have ended and costs of labor and materials have advanced."

The Commission boldly and repeatedly, throughout its brief, makes the flat statement that the return to Memphis Natural has been adequate and that to allow it any refund

from the impounded funds will be "a pure windfall" and "unjust enrichment."

> "* * * there is no question as to the reasonableness of the rates of the purchasers for resale and hence no rate-making question" (C. Br. 10).
>
> "The immediate purchasers who *earned a reasonable return during the impoundment* and who are in a position to receive their full share, receive *a pure windfall*" (C. Br. 11).
>
> "* * * do not involve any issue as to the reasonableness of rates during the impoundment period" (C. Br. 52).
>
> "These findings indicated that the immediate purchasers earned a reasonable return during the impoundment period" (C. Br. 58).
>
> "* * * clearly an undeserved windfall" (C. Br. 61).

But on examination of the record, it is quite clear that the Commission has never made any such finding. It has never even had a hearing on the point.

It is merely asking the Court to *assume* that because Memphis Natural had had its rates approved by the Commission in 1943—those rates continued to net Memphis Natural a fair return throughout the war—and its accompanying inflation.

That assumption is wholly unsound.

The decision of this Court in the *Central States* case was rendered while the present case was pending below. Under the reasoning of that decision, any question as to the adequacy of return to Memphis was immaterial.

If, now, the *Central* case is to be overruled—as the Commission asks—then Memphis asks the opportunity to prove

the real facts as to the unremunerative character of the Memphis rates during the impounding period—which facts are matters of record in the files of the Commission—namely:

1. The rates prescribed by the Commission for Memphis Natural in 1943 did not permit Memphis Natural, at any time during the impounding period, to earn in its regulated business the 6½% return on its investment which the Commission assured them it would do.

2. Even if the entire amount to be now refunded were added to the net income of Memphis Natural during the impounding period, the average return of its regulated business during the period would be less than 6½%.

3. Memphis Natural did not receive any increase in rates during that period, despite increasing costs.

4. The application by Memphis Natural for increased rates in 1946 referred to in the Commission's brief (p. 57)—far from permitting an inference that the Memphis rates without the refund were reasonable—requires an exactly opposite inference.

   This application for a rate increase was made October 31, 1946. At that time the *Central States* case had been decided—under which Memphis Natural would be entitled to the refund, if made. Also, the Circuit Court of Appeals had sustained the order of the Commission in the *Interstate* case by an opinion rendered August 3, 1946. Thus the application for an increase indicated that even with the reduction in costs resulting from the reduction of the Interstate rate—the earnings of Memphis Natural would still be inadequate.

   The application of Memphis Natural for increased rates was withdrawn January 20, 1947, after this

Court had on January 6, 1947, denied the application for certiorari in the *Interstate* rate case (329 U. S. 802). It was withdrawn by Memphis Natural because it was urged to do so by representatives of the Commission on the ground that its earnings were going to be increased by the Interstate rate reduction which had seemingly been conclusively approved by the courts, including this Court.*

Thus Memphis Natural at the time it applied for this further increase had every reason to suppose that it was already assured of the Interstate refund and of a corresponding reduction in the cost of gas purchased from Interstate in the future. It withdrew that application at the request of representatives of the Commission when the denial by this Court of the application for certiorari seemed to assure it that the Interstate reduction was an accomplished fact from which it would receive a substantial benefit.

Moreover, the Commission did not in 1946 or 1947 —and has not since—made any attempt to reduce the rates charged by Memphis Natural to its customers to reflect the reduction in the cost of gas purchased by Memphis Natural from Interstate.

If this case is to be decided on the basis of inferences we submit that the only inference to be drawn from these events, namely, the filing of increased rates; their subsequent withdrawal at the request of the Commission after the Interstate rate reduction was an accomplished fact; and the failure of the Commission to require Memphis Natural to reduce its rates, even after the termination of the Inter-

* Subsequent to such withdrawal this Court granted certiorari in the *Interstate* rate case on a second application and in due course affirmed the order of the Commission and the decision of the court below, 331 U. S. 682, *rehearing denied*, 332 U. S. 785.

state rate case and the impounding period, is that Memphis Natural's rates during the period in question, after giving effect to the Interstate rate reduction, did not yield Memphis Natural in excess of a fair rate of return and furnished no basis for a rate reduction by Memphis Natural.

The court in the *Panhandle* case* was right when it said in its opinion—

> "We think that, prima facie, the contribution of such a distributor is returnable to it."

8. The protection of the consumer does not require or justify the procedure sought by the Commission.

The argument is made that the Court should pass this fund on to the consumers—automatically and *in toto*—because—so the Commission says—this is necessary to prevent unjust enrichment (C. Br. 59-61).

But the consumers ought not to get the money unless they are entitled to it. They are under no circumstances entitled to the money, as such.

They are not entitled to the rate reduction on the basis of the creation of the fund or of the Interstate reduction which gave rise to the fund, unless and until it has been determined in a legal manner

(1) after due hearing, findings and order capable of judicial review;

(2) by an agency qualified and empowered to pass upon the question

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* *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, an unreported decision by the Circuit Court of Appeals for the Eighth Circuit similar to the decision in the *Central States* case.

whether the rates charged by Memphis Natural and by the subsequent distributors during this period have in fact netted more than a fair and reasonable return.

It seems clear that—at least as to interstate rates charged by Memphis Natural to distributors—the Commission could have held hearings, made findings and entered a regular order to the effect that rates to be charged by Memphis Natural to its customers in interstate commerce should be reduced to an appropriate extent as and when the rate from Interstate to Memphis Natural was reduced.

The Commission did not do so in 1943—and it has not done so since—although the question of the propriety of Memphis Natural's rates was brought sharply to the Commission's attention in 1946—by the application by Memphis Natural to increase its rates still further—*after* the C. C. A. had affirmed the Interstate rate reduction.

If the Commission had made such an order, Memphis Natural could have tried out the question of the adequacy of its return then or at any time thereafter.

But if this Court now overrules the *Central States* case and adopts the automatic conduit theory of the Commission—then Memphis Natural will never have an opportunity to demonstrate that it is not being "unjustly enriched."

Thus Memphis Natural—who paid the money—will be left without a remedy.

It is being "assumed" that Memphis Natural will be "unjustly enriched" and Memphis Natural is being given no opportunity to prove the contrary.

The inconvenience of the Commission is not a valid reason why a court should disregard the vital safeguards of due process in order to favor one party against another. As said by Mr. Justice Cardozo, speaking for this Court in *Ohio*

Bell Telephone v. *Public Utilities Commission of Ohio*, 301 U. S. 292:

> "Regulatory commissions have been invested with broad powers * * *. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' * * * of a fair and open hearing be maintained in its integrity. * * * The right to such a hearing is one of the 'rudiments of fair play' * * * assured to every litigant * * * as a minimal requirement."
>
> *"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."*

The Commission argues that courts should "bow to the lessons of experience" (C. Br. 44).

But as Mr. Justice Cardozo said in the passage quoted above—if experience teaches us anything—it teaches that—

> "The right to such a hearing is one of the rudiments of fair play."

and that it cannot be dispensed with merely for reasons of "convenience or expediency"—or to avoid delay.

The Commission suggests (C. Br., 23-24) that the stay order prevented the Commission from reducing Memphis Natural's rates on the basis of the Interstate reduction. It is difficult to understand the Commission's belief in such a limitation upon its own powers. Certainly, under the broad administrative powers held by the Commission, it could—after proper hearing as to the reasonableness or excessiveness of the Memphis Natural earnings and after finding that Memphis Natural's rates would be too high if Memphis Natural received the Interstate rate reduction—have ordered a reduction of the Memphis rates contingent

upon the becoming effective of the Interstate reduction. It could also have provided in such order that Memphis should, in the event that the Interstate rate reduction is subsequently upheld, refund to its customers the appropriate portions of the rates paid by them during the impounding period.

III.

The alleged distinctions between this case and the *Central States* case are not substantial.

1. The distinction that in the present case the immediate purchasers who directly contributed to the impounded fund were engaged in interstate commerce.

It is difficult to understand in principle why this should make any difference under the Commission's theory of the law.

Under that theory—every rate reduction by a wholesale distributor of gas should automatically and *in toto* pass on through each subsequent distributor to the ultimate consumer. The ultimate consumer is presumed to have a right to it and that presumption is conclusive. The courts —so the Commission says—should enforce that "right" on "general equitable principles."

Under that theory—it is wholly immaterial whether the later steps of the distributive process are intrastate in character and beyond the power of federal regulation. The money should pass on anyhow.

That theory was rejected by this Court in the *Central States* case.

The Commission now seeks to distinguish this case from the present case on the ground that in the *Central States*

case the *immediate* purchasers were retailers engaged in intrastate distribution, whereas in this case the *immediate* purchasers from Interstate were themselves wholesalers and engaged in interstate commerce.

But the fact is that in this case also—the ultimate purchasers are local intrastate retailers beyond the reach of regulation by the Federal Power Commission—and even the interstate distribution of gas for industrial purposes is also free from Commission rate regulation.

The Commission concedes that this distinction would merely pass the refunded money from Memphis Natural to its distributors (who, to say the least, have less right to it than Memphis Natural has). The Commission does not claim that this distinction would give the ultimate consumer the money. It merely has hopes that through the customers of Memphis Natural the money would be passed on to the consumers.

The Commission merely hopes that "some part of the fund"—would "probably" reach the ultimate consumer (C. Br., 17; 49).

This is, to say the least, to indulge in speculation at the expense of Memphis Natural, who actually paid the money.

Even the Gas Division of the City of Memphis—the only distributor buying from Memphis Natural which has filed a certiorari petition—does not promise to distribute what it gets to the ultimate consumer. Its claim is not based on that at all.

The Division claimed in its intervening petition that it should receive its pro-rata share, upon the ground that

"it is the ultimate consumer"

and that it (*i. e.*, the Division itself)

"is the person entitled to $387,347" (R. 26).

It contended that it (*i. e.*, the Division) was

> "the ultimate customer under the meaning of the Natural Gas Act" (R. 28).

This although the Division is in fact a retail distributor selling gas to consumers in the City of Memphis.

The Commission concedes that the state authorities have no power to compel the local distributors to pass the money on at this time, as the case now stands, either by retroactive rate reductions or by reparation orders (C. Br. 60).*

The situation is not unlike that presented in the case of *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456. In that case the Ohio Public Utilities Commission attempted to fix retroactively the rates charged by an interstate gas distributor to an intrastate distributor in Ohio. The Court, speaking through Mr. Justice Frankfurter, said (p. 464):

> "The establishment of new rates must be preceded by a finding that the old rates are unjust and unreasonable, and the new rates are prospective as of the date they are fixed. There is no basis in the statute book concluding that the Commission's orders can be retroactive to the date when the Commission's inquiry into the rates was begun; on the contrary the explicit language of the statute precludes such a construction."

However, it is not the fact that the decision in the *Central States* case depended upon the fact that the immediate purchaser (as distinguished from the later purchasers) was engaged in interstate commerce.

The decision was much broader than that—it held squarely that the method of distribution asked for by the

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* See Williams Tennessee Code Annotated 1941, and 1948 Supplement § 5450(e).

Commission was, in effect, an exercise of the legislative power of rate making and as such not properly within the equity power of the Court. It refused to indulge in rate making indirectly, under the guise of general equitable principles. It refused to assume that the refund would result in unjust enrichment—or that a reduction of the rates of the first distributor would necessarily have been followed by a reduction of the rates of subsequent distributors. The Court also held that the Commission's theory would result in intrastate rate making as well—but the decision is broader than that. The Court expressly stated that it affirmed the right of the *Central States Company* to receive the refund on two grounds, saying (324 U. S. 138, at 143-144):

> "This, because the court below had no power as a court of equity to fix rates * * *"

and then continuing as a further reason—

> "* * * *and* as a federal court had no power to adjudicate a matter within the legislative competence of Iowa."

As we have already shown—*supra* pp. 15-19, the refunding of this money to the immediate customers of Memphis Natural would be a departure from its scheduled rates—in the nature of a retroactive rate reduction or a reparation order—and beyond the power of the Commission at this time.

2. The attempt to distinguish the *Central States* case on the ground that in this case Memphis Natural has already received a reasonable return—is unfounded.

The Commission's brief attempts to distinguish the present case from the *Central States* case by arguing that

in the *Central States* case the immediate purchaser was not earning a fair return—while in the present case the immediate purchaser—Memphis Natural—was doing so. This is not the fact.

This Court did say that the petition of Central States had set forth that its rates were insufficient to produce a fair return (324 U. S. 142) and had complained because the court below had "disclaimed jurisdiction to determine the reasonableness of the local rates." (324 U. S. 142.) We do not understand, however, that this Court made any finding that the rates below were too low—or that the decision of the majority turned upon that point. The dissenting opinions, on the other hand, followed the Commission's theory—urged in that case as well as this—that the adequacy of the rates was irrelevant or should be assumed.

The majority opinion held broadly that such a by-passing of the rights of those who paid the money into the fund was not within the power of a court of equity.

In any event, the factual basis for the alleged distinction does not exist.

Although the Commission has throughout its brief made the flat statement that the return to Memphis Natural has been adequate, we have shown above that there is no basis for such a statement; that the Commission has never made any such finding after a hearing conducted as required by the Natural Gas Act; and that inferences to be drawn from the facts shown to the Court are not to the effect that the return of Memphis Natural during the impounding period was excessive, but rather that it did not receive a fair rate of return. (See discussion at page 33 *et seq.*)

In truth, neither in the *Central States* case nor in this case was it established that the intermediate companies earned in excess of a fair rate of return during the impound-

ing period, so that in each case the underlying basis upon which the payment of the impounded funds to the ultimate consumers could be predicated, is missing.

3. Alleged statement of Memphis Natural about passing on.

The Commission's brief (p. 57) makes a passing reference to a sentence in an opinion filed by the Commission some time after the Memphis Natural rate reduction in 1943—that representatives of the Company had stated that any future benefit the Company might receive by reason of the Interstate order would be passed on to its customers. It is not clear just what inference the Commission expects the Court to draw from this vague statement.

The new rate schedule filed by Memphis Natural was authorized by the Commission to be effective July 26, 1943. On August 31, 1943, the Commission entered a formal order approving the new rate schedules effective as of July 26, 1943 (R. 31). On September 21, 1943, the Commission filed an opinion—approximately two months after the conferences between Memphis Natural and the Commission's staff had been concluded—which contained the general, vague, unilateral statement referred to above.

It is, of course, possible that during the discussions—which lasted over several months—some representative of Memphis Natural may have said that if the Interstate rate reduction resulted in Memphis Natural's earnings in excess of the allowable return, some rate reduction would be in order. However, the disappointing fact is that the rate schedule promulgated in 1943 for Memphis Natural did not produce the allowable return. As we have shown above, Memphis Natural is prepared to prove this if the point becomes material.

The Commission's brief makes no claim that this statement was a definite agreement. It could not have been regarded as such by the Commission or the language in the Commission's opinion would have been more explicit. If any such actual agreement had been intended, surely it would have been reduced to writing and incorporated in the record in some formal way.

The agreements which were reached between the parties were reduced to writing, and there is no such record of any written agreement of this nature. The Commission does not contend that there was one. Indeed, it would have been inconceivable that any responsible officer of the Company would have been willing to make any such unqualified agreement binding on his Company in the face of the rapidly changing war conditions which then existed.

The courts will presume that intelligent men will incorporate into their contracts all matters about which they have agreed, and that the agreement embraces the entire understanding. That rule is elementary law and has been stated at one time or another by courts everywhere. As this Court said in *Bast* v. *First National Bank*, 101 U. S. 93:

> "No principle of evidence is better settled at the common law than that, when persons put their contracts in writing, it is, in the absence of fraud, accident, or mistake, 'conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing.' 1 Greenl., Ev., sec. 275."

The Court quoted with approval:

> "'Where parties have deliberately put their engagements in writing, and no ambiguity arises out of the terms employed, you shall not add to, contradict, or vary the language mutually chosen as most fit to express the intention of their minds.'"

Indeed, if it were necessary, we should contend that it would be against public policy for any utility to enter into any such vague, unqualified agreement, unlimited as to time, without regard to conditions which might exist thereafter. It might well be that such an agreement would disenable it from adequately and properly performing its public duties.

Even if the existence of some agreement were admitted, it could not operate to require Memphis to pass on the impounded moneys. Such an agreement would not be a part of the Memphis rate structure. It is not included either in the schedule of rates itself or in the order of the Commission approving such rates. Rates are established by filing the rate schedule with the Commission or by an order of the Commission—not by a side agreement of the natural gas company with the Commission. The Natural Gas Act makes no provision for rate regulation by agreement not reflected in the filed rates.

If the Commission had entered an order requiring Memphis Natural to give effect in its rate schedules to such reduction in the cost of gas as might result from the order in the Interstate case, that would have been a matter which Memphis Natural could have appealed from, or could have sought to have modified at any subsequent time, as soon as it had been demonstrated by actual experience—as a result of what actually happened—that its rates were unremunerative. But no such order was entered—and the understandings that were executed contain no reference to any such agreement.

4. The difference between the terms of the impounding orders in the *Central States* case and in the present case is immaterial.

The argument at page 61 of the Commission's brief that the difference in the form of the stay orders in the *Central*

States case justifies a different decision in this case is too tenuous for serious consideration.

The issue in the *Central States* case did not turn on a question of form.

It is true that in the present case the stay order provided (R. 2) that the funds should be returned to

> "* * * such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act."

The court further reserved power to modify the order to protect the rights and interests

> "* * * of the ultimate consumers or other parties financially interested in the impounded funds."

This was a natural form of stay order in view of the decision of the Circuit Court of Appeals in the case of *Natural Gas Pipe Line Company* v. *Federal Power Commission*, 134 F. 2d 263 (C. C. A. 7th 1942), which was then outstanding and had not yet been reversed in principle as it later was by the Supreme Court in the *Central States* case, 324 U. S. 138.

It should be noted, however, that there is nothing in the terms of the stay order which constitutes an adjudication of any kind as to who is entitled to the fund. It merely gives notice that the court will distribute the fund to whoever may be entitled to it—whether "ultimate consumers of gas *or other persons.*" But the form of the order does not in any way determine the power of the court or the rights of the parties.

Memphis Natural is one of the "other persons" referred to in the order. The court below has so found and decided

accordingly. The court had no intention of distributing the fund to consumers unless they were shown to be legally entitled to receive it. It has found that the consumers are not entitled to receive it and nothing in its order prevented it from returning to Memphis Natural the part which Memphis Natural paid in.

Neither did the decision of this Court in the *Central States* case turn upon the form of the bond in that case. If it had, all the discussion of general principles would have been unnecessary.

Conclusion.

The Commission is asking this Court to overrule its opinion in the *Central States* case, 324 U. S. 138, rendered less than four years ago.

It is asking the Court not only to proceed outside the framework of the Natural Gas Act—but also to exercise the legislative power of making rates and to substitute its own action for the action of the proper administrative authorities, state and federal.

It is asking all these things in the name of expediency and convenience.

We submit that the decision in the *Central States* case was not a "sport in the law" and that it was not "inconsistent with what preceded and what followed it." It should be reaffirmed.

As said by this Court in *Screws* v. *United States*, 325 U. S. 91, 112-13:

> "But beyond that is the problem of *stare decisis*. The construction given §20 in the Classic case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule

adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The Classic case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the Classic case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of §20 to meet the exigencies of each case coming before us."

Respectfully submitted,

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